

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25/07/2002

CORAM

THE HONOURABLE MR.JUSTICE M. CHOCKALINGAM

T.O.S.NO.25 OF 1987

1. Yashoda Bai
2. Lodd Narendradas
3. Lodd Jayendradas .. Plaintiffs

Vs.

Dr.Lodd Surendradas .. Defendant

!For Plaintiffs : Mr.A.Seshan

^For Defendant : Mr.N. Varadarajan

:JUDGMENT

This suit has been filed for the issue of probate in respect of the last Will and testament executed by Lodd Balamukundas on 2.3.1975.

2. The averments in plaint are as follows:

One Lodd Balakukundas, the testator of the Will, dated 2.3.1975, died on 19.2.1981. The deceased left behind him his wife, four sons and five daughters. The said Lodd Balamukundas executed his last Will and Testament at Madras on 2.3.1975 in the presence of the witnesses. The plaintiffs are the sole executors named in the said Will. The amount of the assets which are likely to come into the hands of the plaintiffs does not exceed in the aggregate sum of Rs.2,65,902/- and the net amount of the said assets after deducting all items which the plaintiffs are by law allowed to deduct is the value of Rs.2,64,902/-. The plaintiffs undertook to duly administer the properties and credits of the said Lodd Balamukundas and in any way concerning his Will by paying first his debts and then to the legacies therein bequeathed so far as the assets will extend and to make full and true inventory thereof and exhibit the same before this court within six months from the date of grant of probate to the plaintiffs. Hence, for all the reasons stated above, the suit has got to be decreed as prayed for.

3. The defendant has filed a written statement stating that the Will dated 2.3.1975 alleged to have been executed by the deceased, Lodd Balamukundas is not true, valid and binding on this defendant; that he was not in a sound disposing state of mind at the time of execution of the Will; that there are several intrinsic and suspicious features and circumstances to show that the alleged Will is not a true and valid one; that the building bearing Door No.25 (New No.48), Raghunayakalu Street, Madras-3 did not belong to the

deceased; that it is a trust property, and hence, the suit has got to be dismissed with costs.

4. On the pleadings by the respective sides, the following issues were framed:

1. Is the Will dated 2.3.1975 executed by Lodd Balamukundas true and genuine?

2. To what reliefs are the plaintiffs entitled to?

5. The plaintiffs have filed this suit for issue of a probate alleging that the husband of the first plaintiff and the father of the plaintiffs 2 and 3 Lodd Balamukundas executed his last Will and Testament on 2.3.1975 at Madras in the presence of two witnesses. One of the sons of the testator Dr.Lodd Surendradas has contested the suit by stating that the said Will is not true, valid and binding on him; that the same was not executed by his father in a sound and disposing state of mind; that there was no valid execution and attestation, as required by law; that there are so many intrinsic and suspicious features and circumstances to show that the alleged Will was not a true and valid one.

6. On the side of the plaintiffs, P.W.1 to P.W.3 were examined and Ex.P.1 to Ex.P.5 were marked. There was no evidence on the side of the defendant and no document was marked.

7. Arguing for the plaintiffs, the learned counsel would submit that the plaintiffs originally filed a petition seeking this court to probate the Will of Lodd Balamukundas, the husband of the first plaintiff and the father of the second and third plaintiffs and on caveat by the defendant's side, the same has been converted into a testamentary suit; that the testator Lodd Balamukundas had lot of immovable properties at Madras, Thiruvellore and Ranipet; that the testator was active till his life time and was possessed of sound mind throughout; that he had number of litigations pending in Court; that for instance, two suits in O.S.Nos.4346 and 5399 of 1974 were pending on the file of the City Civil Court, Madras; that after full trial, common judgment was rendered on 18.3.1980; that the plaintiffs have filed a printed copy of the common judgment under Ex.P.3; that apart from that the tenant filed a suit in O.S.No.8662 of 1972 on the file of the City Civil Court, Madras; that a judgment, dated 5.1.1976 was rendered as found in Ex.P.4; that all his children were married and settled in life even during his life time and he used to often visit his daughters, who are in different States in north India; that he used to have trips by train; that he was managing all his properties throughout his life; that the testator, who desire to make arrangement in respect of the properties, executed Ex.P.1 Will; that Ex.P.1 would clearly reveal that it was in his handwriting; that after the preparation of the same, he has taken the said document to his standing counsel Mr. Venkatesan for execution and attestation; that in order to prove the proper execution and attestation, the plaintiffs have examined P.W.3, who is a practising lawyer and was attached to the office of Mr.Venkatesan for nearly 30 years; that the said witness has clearly spoken about the valid execution and attestation of the said document; that there are no suspicious circumstances attendant over the Will; that it is significant to note that the testator has created a life interest in favour of his wife and has given reminder to his five daughters and has not bequeathed anything to the second and third plaintiffs herein; that if the plaintiffs had desire to grab the property, they could have well exercised their influence to get any one of the

properties in their favour, but they have not done so and the same would indicate that the testament was an outcome of a free will and volition of the testator and the plaintiffs 2 and 3 had no role to play in the preparation, execution and attestation of the document; that the defendant have not made out any defence except the bald assertions that the testator was not in a sound and disposing state of mind and thus the plaintiffs have proved that the Will under Ex.P.1 is a true and genuine one, as required by law, and hence, probate has got to be issued in their favour.

8. Countering to the above contentions of the plaintiffs' side, the learned counsel for the defendant would submit that Ex.P.1 testament in respect of which, the plaintiffs have come forward with a request to issue probate is neither true nor genuine as the plaintiffs have not proved the execution and attestation as required by law; that there was no occasion for Lodd Balamukundas to execute the testament; that it is true that the testament is in the handwriting of the said Balamukundas and it bears his signature also; that P.W.2 has admitted in his evidence that he knew Mr.M.K.Hidayathullah, attesting witness examined as P.W.3, for a long time; that on a careful scrutiny of the evidence of P.Ws.2 and 3 would indicate that P.W.3 in order to oblige his friend has subscribed his signature as attesting witness after a long time, i.e. after the demise of Balamukundas; that P.Ws.1 and 2 have categorically deposed that they had no knowledge about the execution of the document and they came to know about the same after the death of Lodd Balamukundas; that on the contrary P.W.3 has deposed that they had knowledge about the execution of the Will; thus this would cast a doubt whether P.W.1 and P.W.2 had a role to play in the preparation, execution and attestation of the Ex.P.1, document; that Lodd Balamukundas, who had lot of litigations and used to attend the court every day, could not have chosen to write a Will by himself and Ex.P.1 is also an unregistered one and this would cast a doubt about the truth and genuineness of Ex.P.1 Will and thus, the plaintiffs have not proved the execution and attestation of the Will as required by law and in view of the suspicious circumstances attendant over the document, the court has to necessarily dismiss the suit.

9. The plaintiffs have come forward with a request to probate Ex.P.1 Will, an unregistered one alleging that Lodd Balamukundas, the husband of the first plaintiff and the father of the plaintiffs 2 and 3, executed the same on 2.3.1975. Admittedly, the testator Lodd Balamukundas, a native of Gujarat, who settled down at Madras, had his wife, the first plaintiff herein, four sons and five daughters. All his sons and daughters were married during his life time and no one was depending on him. He possessed lot of immovable properties, both house properties and agricultural lands, at Madras, Thiruvellore and Ranipet and till his life time he was managing the said properties. He had lot of litigations pending in Courts and he was attending the same also. Leaving behind his wife, four sons and five daughters as heirs, Lodd Balamukundas died on 19.2.1981 as evidenced by Ex.P.2 death certificate.

10. In order to prove the testament, the plaintiffs 2 and 3 have examined themselves as P.W.1 and P.W.2 and have examined one of the attesting witnesses as P.W.3. The plaintiffs have filed an affidavit stating the consent of all his sisters for granting of probate in favour of the plaintiffs. Both P.W.1 and P.W.2 have deposed that their father Lodd Balamukundas was active and not suffering from any illness and was in a sound

and disposing state of mind till his life time. P. W.1 has categorically deposed that his father was attending the maintenance of the house and all other works till his life time; that he used to visit his daughters residing in northern State for quite a number of occasions; that he used to go alone by train; that he used to go on pilgrimage; that he was managing all the family properties and used to attend the cases pending in Court; that he had two cases pending in City Civil Court in O.S.Nos.4346 of 1974 and 5399 of 1974; that Ex.P.3 is the common judgment dated 18.3.1980 rendered by the City Civil Court, Madras in O.S.No.4346 of 1974 and O.S.No.5399 of 1974; that Ex.P.4 is the certified copy of the judgment, dated 5.1.1976 in O.S.No.8662 of 1972 on the file of the City Civil Court, Madras; that in all the above suits, he has appeared before the Court and also deposed as witness. It is pertinent to point out that all the above statements by P.W.1 in his evidence are not disputed by the defendant's side. The court is of the view that the above evidence, both oral and documentary, would be sufficient to find that the said testator was active and had sound and disposing state of mind during the relevant time.

11. One of the attesting witnesses, M.K.Hidayathullah, examined as P.W.3, who is a practising Advocate of this Court from 1972, has deposed in his evidence that he was closely associated with one Mr.A. Venkatesan right from the beginning of his service in the year 1972; that the testator Lodd Balamukundas was the client of Mr.Venkatesan; that it was the testator, who brought Ex.P.1, Will to the residence of Mr.venkatesan and informed him that he has already prepared the Will and consulted with Mr.Venkatesan whether he had written the Will in order; that this witness gave his consent to attest the Will. Added further the attesting witness P.W.3 that the testator signed in Ex.P.1 Will in the presence of himself, Mr.Venkatesan and other attesting witness, Dayal Prasad; that the witness signed as the first attesting witness and following the same, the second attesting witness Dayal Prasad signed in the Will in the presence of the testator; that at the time of the execution of the Will by the testator, both the attesting witnesses were presence. An affidavit sworn by P.W.3 narrating all necessary facts as to the execution and attestation has been filed by the plaintiffs. From the evidence of P.W.3 it would be abundantly clear that at the time of execution of the Will, the testator was good mental and health condition. It is true that the plaintiffs have examined only one attesting witness. The defendant's side is unable to show any reason or circumstances to disbelieve his evidence. On careful scrutiny of his evidence, the court is of the view that his evidence is natural, acceptable and trustworthy, apart from the evidence as stated above.

12. Many are the circumstances pointing to the truth and genuineness of the document. According to the plaintiffs, Ex.P.1 testament is in the handwriting of the testator, Lodd Balamukundas. P.W.3 has categorically deposed that Ex.P.1 testament was executed by Lodd Balamukundas in his presence. It is significant to note that neither handwriting nor the signature of the testator in Ex.P.1 is disputed by the defendant. The Honourable Supreme Court in a case reported in J.T. (199 6)4 SC 333 (MRS.JOYCE PRIMROSE PRESTOR VS. MISS VERA MARIE VAS) has held as follows: "While the presumption in the case of ordinary Wills is as stated above, in the case of "holograph Wills", the presumption is all the more a greater presumption. Ex.P.1 is a "holograph Will". It is one which is wholly in the handwriting of the testator. The Calcutta Gigh Court in Ajit Chandra

Majumadar v. Akhil Chandra Majumdar, A.I.R. 1960 Cal 551 at 552 stated about such a Will, thus: "The whole of this Will was written in the hand by the testator himself in English. The handwriting is clear and firm. The law makes a great presumption in favour of the genuineness of a holograph Will for the very good reason that the mind of the testator in physically writing out his own Will is more apparent in a holograph Will than where his signature alone appears to either a typed script or to a script written by somebody else."

The recitals in the testament would clearly indicate that it was an outcome of the free will and volition of the testator. It remains to be stated that the Will was written by the testator himself. A perusal of the testament would reveal that the testator has given life estate to his wife Yashodabai and thereafter the properties should go to all his five daughters, after retaining some of the properties for certain charities to be done in his name. The testament reads "while I am in a proper health and proper mind and understanding execute this testament of last Will." Thus it would be clear that the plaintiffs 2 and 3 were not at all beneficiaries under the Will.

13. It is not the case of the defendant that the plaintiffs had any role to play or had they participated in the preparation of Ex.P.1, Will. It remains to be stated that Ex.P.1 is a holograph Will. It is not even their case that the executors were present at the time of execution of the document. There is nothing to suggest that either P.W.1 or P.W.2 was present at the time of execution or attestation of the document. The Will, under challenge, was executed by the testator on 2.3.1975 and he died on 19.02.1981 as evidenced by Ex.P.2. Thus, it would be clear that after the execution of the document, the testator had lived for six years, during which period, he has attended his litigations and participated in the proceedings by giving evidence also before Court. Had it been true that the Will has come into existence under any influence or an outcome of any external force, the testator could have well revoked or cancelled the same. It is an admitted position that the plaintiffs 2 and 3 were living all along with the testator and if they have any intention to grab the property, they could have taken advantage of the situation and obtained the document in their favour, but they have not done so.

14. It is not the case of the defendant that the testator is tainted with any invalidating factors, like undue influence, coercion, misrepresentation, etc. Under the stated circumstances, the contentions of the defendant's side that the testator was not in a sound disposing state of mind and there was no valid execution and attestation cannot be countenanced. Quite evident from the discussions made above that the plaintiffs have clearly proved by adducing oral and documentary evidence that the testator was in a good and sound disposing state of mind at the time of execution of Ex.P.1 Testament; that there was execution and attestation of the same, as required by law. While the plaintiffs have adduced sufficient evidence as stated above, the contesting defendant has not examined himself either to contravert the plaintiffs' case or to put forth his defence. After careful scrutiny of the available evidence, the court has to necessarily reject the contention of the defendant's side that there were suspicious circumstances attendant over the testament. The Court may hasten to say that there are no suspicious circumstances at all, which would throw a doubt on the truth and genuineness of the testament. It is true that P.W.1 and P.W.2 have deposed that they came to know about the Will few months after the death of their father. The

evidence of P.W.3 would indicate that P.W.1 and P.W.2 had the knowledge about the Will. It is true that it strikes a doubt, but this cannot be a circumstance to reject the Will in the instant case in which by ample, sufficient and acceptable evidence proved to be true and genuine. The Apex Court in a case reported in AIR 1998 SC 2861 (GURDIAL KAUR AND OTHERS VS. KARTAR KAUR AND OTHERS) has held as follows:

"The law is well stated that the conscience of the Court must be satisfied that the Will in question was not only executed and attested in the manner required under the Indian Succession Act, 1925, but it should also be found that the said will was the product of the free volition of the executant who had voluntarily executed the same after knowing and understanding the contents of the Will. Therefore, whenever there is any suspicious circumstance, the obligation is cast on the propounder of the will to dispel suspicious circumstance."

A Division Bench of this Court comprising their Lordships R. Jayasimha Babu and K.Gnanaprakasam, JJ., in a case reported in 2001 (3) CRC 283 (CORRA VEDACHALAM CHETTY AND ANOTHER VS. G. JANAKIRAMAN) had occasion to consider the duty of the probatory court in testamentary jurisdiction have held as follows:

"25. The testamentary Court is a Court of conscience. It is not a Court of suspicion. It is not the law that, whenever a Will is sought to be proved in the Court, the Court should start with the presumption that the Will is not genuine, that it is fraudulent and that the person who chooses to probate the Will must remove all such suspicious even they are not unreal. The object of the probate proceedings is not to render the testamentary document ineffective but to make it effective and render the terms of that Will operative. In doing so, the Court has to take note of the fact that the testator is not available to the Court to state as to whether the document in fact was his or her last Will or as to whether he or she had signed the same and whether the attestors had signed receiving an acknowledgement from him about the execution of the Will. It is for that reason that the Courts should be cautious while dealing with the evidence placed before them in relation to the executions and attestation, of the Will as also the disposing state of mind of the testator.

26. This need for caution, cannot be exploited by unscrupulous caveators who choose to cull out imaginary suspicious with a view to prevent the legatees under the Will from claiming the benefit thereunder and to render the last Will of the deceased wholly ineffective. In this context, the conduct of the persons who raise the alleged ground for suspicions sought to be raised by such persons. In this case, the suspicion is sought to be raised by a person who is keenly interested in making the Will ineffective and whose conduct is far from one which would inspire confidence in truthfulness of his statements."

Needless to say that the Will is to be proved in the same manner as any other document. In addition to such proof, the requirements under Section 63 of the Succession Act and Section 68 of the Evidence Act have to be satisfied. A duty is cast upon the court of testamentary jurisdiction to take into account all materials available whether to believe that the testament was duly executed by the testator or such execution being probable, if the conscience of the Court is satisfied by the propounder of the Will adducing evidence to dispel any suspicious or unnatural circumstances attached to the Will. In the

instant case, the court may hasten to say that the plaintiffs have established affirmatively that the testament is in the handwriting of the testator, the testator was aware of the contents of the Will and was in sound state of mind while executing the Will. For all the above, the court has to necessarily find that the challenge made by the contesting defendant is unfounded and baseless and has to hold that Ex.P.1 Will is true, genuine and valid document.

15. In the result, this suit is decreed. Issue probate in favour the plaintiffs. There shall be no order as to costs.

25-07-2002

Index : Yes.

Internet : Yes

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List of Witnesses :

1. P.W.1 L.Narendra Das
2. P.W.2 Lodd Jayendradas
3. P.W.3 M.K.Hidayathullah

Defendant - No evidence

List of Exhibits :

1. Ex.P.1 - Unregistered Will dated 2.3.1975
2. Ex.P.2 - Death certificate of Lodd Balamukundas
3. Ex.P.3 - Common judgment dt.18.3.80 passed by City Civil Court, Madras in O.S.4346 & 5399 of 1974
4. Ex.P.4 - Certified copy of the judgment dt.5.1.76 in O.S.No.8662/72 on the file of City Civi Court Madras
5. Ex.P.5 - Affidavit of Mr.M.K.Hidayathullah

vvk

M. CHOCKALINGAM, J

JUDGMENT

IN

T.O.S.NO.25 OF 1987

?IN THE HIGH COURT OF JUDICATURE AT MADRAS

%DATED: 25/07/2002

*CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

+C.S.No.423 of 1992

#M/s.Albert & Company
13/1, Whannels Road,
Egmore, Madras 600 008. .. Plaintiff

vs

\$The Oil and Natural Gas
Commission, The Southern
Regional Business Centre,
represented by its Group
General Manager, Gandhi Irwin
Road, Egmore, Madras 8. .. Defendant

!For Plaintiff : Mr.Irwin Aaron

^For Defendant : Mr.D.Saravanan

:JUDGMENT

The plaintiff has come forward with this suit seeking for an appointment of an independent arbitrator to decide the disputes between the plaintiff and the defendant.

2. The learned counsel appearing for the plaintiff would submit that pursuant to the tender notice dated 22.4.89, the defendant appointed the plaintiff as its contractor for the transportation and handling of materials; that there was an agreement dated 9.8.89 between the parties in that regard; that as per the agreement, the defendant was empowered to appoint a sole arbitrator for the adjudication of all the disputes arising out of the contract; that the plaintiff has no choice in the said appointment; that the defendant extended the period of contract by six months and called for a tender for the appointment of a contractor in the place of the plaintiff; that at the request of the defendant, the plaintiff continued to perform the contractual obligations beyond 31.5.91 demanding enhanced rates quoted; that during October 1991, the plaintiff terminated the contract with the expiry of 30.11.1991; that yet the defendant extended the period of contract by 6 months from 1.12.91 to 31.5.92 on the same terms and conditions; that since the defendant arbitrarily delayed the appointment of the contractor, the plaintiff filed a writ petition No.15944/91 for the issue of writ of mandamus, wherein notice of motion was ordered; that though the plaintiff made a conditional offer to perform the contractual obligations after 30.11.91 subject to the payment of the rates quoted in the tender, the defendant did not agree for the same but insisted upon the plaintiff to carry on the obligations on the old rates, and thus, the plaintiff filed a suit in C.S.No.1435 of 1991 before this Court to set aside the certain clauses in the agreement; that this court granted an order of interim injunction in O.A.No.869/91 restraining the defendant from extending the contract; that on 20.12.91, this Court vacated the order of interim injunction; that the appeal in OSA No.5 of 1992 therefrom was also dismissed; that the defendant by a letter dated 8.1.92 terminated its contract with the plaintiff and by another letter dated 10.1.92 informed the plaintiff that the loss to the extent of Rs.10 lacs has been caused to it on account of the breach committed by the plaintiff upto 10.1.92; that the

defendant has also threatened to invoke the bank guarantee, and hence, the plaintiff filed another writ petition in W.P.No.371 of 1992 to declare that the threatened act of the defendant is illegal; that in the said writ petition, notice of motion was ordered; that W.P.No.15944 of 1991 and W.P.No.371 of 1992 were dismissed; that the plaintiff is also having a claim for Rs.12 lacs against the defendant being the excess expenses incurred in the performance of the contract; that the adjudication of the disputes by the nominee or by an employee of the defendant is not feasible and should not be resorted to; that the same is against the principles of natural justice that no person can be a judge of his own case; that it is also pertinent to note that the disputes cannot be decided by a layman; that the defendant's nominee should not be a fit and proper person to decide such an issue; that the apprehension of bias on the part of the sole arbitrator to be appointed by the defendant is well founded; and hence, an independent arbitrator has to be appointed to decide the disputes that have arisen between the plaintiff and the defendant.

3. Countering to the above contentions of the plaintiff's side, the learned counsel appearing for the defendant would urge that the suit was filed for appointment of an arbitrator for adjudicating upon certain disputes arising out of an agreement dated 22.4.89 which provides for arbitration; that the present proceedings are not bona fide; that the execution of the contract and its extension are admitted; that since the plaintiff breached the terms of the contract, the bank guarantee in the sum of Rs.8 lacs was invoked and encashed; that the defendant suffered damages; that it is pertinent to note that the plaintiff did not make any demand for appointment of an arbitrator in terms of the contract; that this court has no jurisdiction to vary the terms of the contract, and thus, the suit is wholly misconceived; that having contracted for the appointment of an arbitrator by ONGC, the plaintiff cannot turn round and set up a case to wriggle out of the contract; that it remains to be stated that there was no name suggested for appointment; that the arbitration clause provides that no person other than a person appointed by the Commission should act as an Arbitrator; that the suit is devoid of merits, and hence, the same has to be dismissed.

4. After careful consideration of the rival pleadings and submissions made by the respective counsel, the court is of the view that the plaintiff's request for an appointment of an independent arbitrator cannot be granted.

5. Admittedly, the agreement entered into between the parties has an independent clause as to arbitration. Clause 21(1) of the agreement dated 9.8.89 reads as follows:

"21. ARBITRATION:

21.1. All questions and disputes or differences relating to or arising under these terms and conditions or as to any other question, claim right, matter or thing whatsoever in any way arising out of or relating to the terms and conditions of the contract or otherwise concerning the works or the execution or failure to execute the same whether arising during execution of the contract or after the completion or abandonment thereof, shall be referred to sole arbitration of the persons appointed by the Commission. There will be no objection to any such appointment that the Arbitrator is an employee of Commission, that he had to deal with the matters to which the contract relates and that in the course of his duties as an employee of Commission, he had expressed view on all or any of the matters in dispute and differences. The

Arbitrator to whom the matter is originally referred, being transferred or vacating the office or inability to act for any reason, the Commission at the time of such transfer, vacation of office or inability to act, shall appoint another person or act as Arbitrator in accordance with the terms and conditions of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by the Commission as aforesaid should act as Arbitrator and if for any reason that is not possible the matter is not to be referred to arbitration at all."

It cannot be disputed that the said Arbitration Clause would bind both the parties. As per the said Clause, an Arbitrator has to be appointed by the Commission on the request of the plaintiff. It is not the case of the plaintiff that they have made any request for the appointment of an arbitrator or any arbitrator was appointed at any point of time. It is pertinent to note that the plaintiff has already filed a suit in CS 1435/91 to set aside some of the Clauses under the agreement between the parties including the arbitration clause, stated supra. During the pendency of the said suit, the plaintiff has filed this suit seeking the relief of appointment of an independent arbitrator and has withdrawn the earlier suit filed to set aside the arbitration clause.

6. The learned counsel for the plaintiff would submit that the plaintiff has got a reasonable apprehension that if the arbitrator is appointed by the Commission, it would be prejudicial to the interest of the plaintiff. Having agreed for an arbitration clause, as found under Clause 21(1) of the agreement, the plaintiff cannot now be permitted to say that an independent arbitrator has to be appointed. The court is of the view that the apprehension of the plaintiff at this stage is unfounded and bereft of reasons. The court is also of the view that the instant suit filed by the plaintiff even before the appointment of an arbitrator as per Clause 21(1), for appointment of an independent arbitrator is pre mature, and hence, the suit is devoid of merits, and the same is liable to be dismissed.

7. In the result, this suit is dismissed. There shall be no order as to the costs.

Index: Yes

Internet: Yes

25-7-2002

nsv/

M.CHOCKALINGAM, J.

C.S.No.423 of 1992

?IN THE HIGH COURT OF JUDICATURE AT MADRAS

%DATED: 25/07/2002

*CORAM

THE HONOURABLE MR.JUSTICE M. CHOCKALINGAM

+C.S.NO.180 OF 1990

#1. N. Venkatesh
2. N. Kasi Viswanathan
3. N. Ramesh .. Plaintiffs

Vs.

\$1. D.V.D' Monte
2. Anne D' Monte
3. David D' Monte
4. Gerald D' Monte
5. Paul D' Monte
6. Marlene D' Monte
7. Kay D' Monte
8. Rose Mary D' Monte .. Defendants

!For Plaintiffs : Mr.R.Subramanian for 1st plaintiff
Mr.R.Krishnaswami,Senior Counsel,
for Mr.C.Ramesh
for plaintiffs 2 and 3

^For Defendants : Mr.S.Sampath Kumar for 1st defendant

No appearance for defendants 2 to 8

:JUDGMENT

This suit has been filed by the plaintiffs for specific performance of the agreement dated 13.5.1981 and direct the defendants to execute the sale deed in favour of the plaintiffs or their nominees as per the terms of the agreement on payment of the balance of consideration of Rs.4,90,896/- and if the defendants fail to execute the sale deed, direct them to put possession of the suit property with other reliefs as mentioned in the plaint.

2. The plaint averments are as follows:

The first defendant entered into an agreement dated 13.5.1981 with the plaintiffs and their mother and one S.Padmanabhan making the first defendant's wife and children as partners to safe guard the interest of the first defendant in the deed to sell the property situate at Nos.15, 16 and 17, Wallers Road, Madras for a consideration of Rs.13,00,000/- and received an advance of Rs.2 lakhs from the plaintiffs and their mother and handed over all the original documents as collateral security for the advance paid. The first defendant undertook to demolish the superstructure within two months for starting their construction work. Some portion of the building was not demolished since the same was under attachment as per the order of the court. The contractor is still occupying the entire area for completing the demolition work. The plaintiffs submitted the building plan to M.M.D.A. and the Corporation Authorities and paid demolition fees. Because of the attachment proceedings the work was stopped and the first defendant promised to get an order raising the attachment proceedings in OS No.4 of 1984 and

therein the first defendant had given an undertaking not to sell the Wallers Road property and commercial accommodation at the Blue print stage was stopped. Apart from Rs.2 lakhs, the first defendant received further payments from the plaintiffs under stamped receipts for a sum of Rs.1,44,500/- on various dates ending 6.2.1982. The first defendant was not in a position to repay the principal and interest and postponing the renewal of the pronotes. As surety and Guarantor the first plaintiff paid the principal and interest and got necessary endorsements and receipts for claiming from the first defendant. The total amount under the pronotes with interest comes to Rs.1,18,33 6/- as on July, 1987 for which also the original documents stands as collateral security as per the understanding and arrangements. The payment through the discharge of pronotes to clear the title kept as collateral security through the first plaintiff comes to Rs.1,89,236/- which can be treated as further payments apart from Rs.2 lakhs under the agreement and Rs.1,44,500/- paid after the agreement. Therefore, the total payment as per the agreement comes to Rs.5,33,736/- out of the total consideration of Rs.13 lakhs. Under the agreement of sale, the first defendant wanted to have about 2000 sq.ft. in the first floor for his own use agreeing to pay a reasonable price a little less than the prevailing market price mutually agreed upon. The plaintiff undertook to clear the balance of consideration within 18 months from the date of handing over the vacant site for construction and if the plaintiffs fail to pay within 18 months, the plaintiffs have to pay interest at 18% for the balance of consideration after working out of the cost and giving credit for the 2000 sq.ft. in the first floor. The first defendant has to execute the sale deeds to the plaintiffs or to their nominees or allottees for the proportionate considerations paid as per the agreement. The plaintiffs' mother Indrani died on 5.2.1983 leaving the plaintiffs as class-1 heirs since their father released his interest in the estate of S.Indrani in favour of the plaintiffs. S.Padmanabhan who also died, was only a working Engineer for the scheme under the first plaintiff. The first defendant, all of a sudden, sent a notice dated 25.6.1987. For that notice the plaintiffs' Advocate sent a reply dated 3.7.1987 stating the correct state of affairs. Under the partnership deed dated 13.5.1981, the other partners, Mrs.D'Monte and her children on their retirement are entitled to share the profit and loss. In the rely dated 3.7.1987 the plaintiffs claimed Rs.2,77,368/- as loss from the defendants. Further the first plaintiff has discharged the pronotes executed by the first defendant which comes to Rs.1,18,336/-. Therefore the total investment of the plaintiffs for the purpose of partnership as on July, 1987 come to Rs.9,45,236/- on the retirement of the partners the defendants controlling 50 % share have to pay Rs.2,41,200/- + Rs.34,168/- to the plaintiffs as on July, 1987. The first defendant sent a rejoinder dated 20.8.1987. After this rejoinder the plaintiffs were negotiating with the first defendant and the first defendant wanted to give up their family claim of profit if a lump-sum is paid into the credit of an appeal against the company petition and wanted to share the profit in appreciation of the land value if sold to third parties. The talks were never ending due to third parties fluctuating offer for the land due to daily appreciation. There is a part performing for the agreement dated 13.5.1981. The plaintiffs are entitled to file a suit for specific performance under Article 54 of the Schedule of the Limitation Act. The plaintiffs are still ready and willing specifically to perform the agreement on their part of which the defendant has

had notice. Hence, the suit has got to be decreed as prayed for in the plaint.

3. The averments in the written statement filed by the first defendant are as follows:

Since the suit has been filed on 20.2.1990 after a lapse of 9 years, the suit is barred by limitation and in view of the facts that there is no compliance with Section 16(C) of the Specific Relief Act, the suit is liable to be dismissed in limine and the suit is liable to be dismissed in limine on the ground that the contract of sale is between the first defendant on the one hand and 13 persons on the other hand as joint purchasers. Of the 13, the third purchaser S.Indirani is no more and the 8th purchaser also is no more. The purchaser No.5 is also no more. Of the rest the purchasers 7 to 13 have abandoned the contract consequent on the termination of the agreement between them to form a partnership. The plaintiffs were never ready and willing to perform the obligation on the part of the purchasers. As a matter of fact, the plaintiffs were never in the scene and it was their father A.Narayanaswamy who acted in the name of the plaintiffs who were then studying in colleges. The plaintiff's father is a dealer in real estate and he has entered into the contract in the name of the plaintiffs. There is no legal bar to implement an agreement entered into prior to the order of attachment. The plaintiffs have not even advanced any reason as to why they did not take any step. The plaintiffs have no resources of their own. It is plaintiffs' father who has been speculating and the very contract itself was a piece of speculation made by the plaintiffs' father. In the prayer it is said that the balance of sale consideration remaining unpaid is Rs.4,90,896/-. This is the amount the plaintiffs state that they are willing to pay on the date of the plaint. Nowhere have they alleged that they were ready and willing to pay this sum and called on this defendant to execute the sale deed. The allegation that the amount of Rs.4,90,894/- is due is a palpable falsehood. The plaintiffs claim that they have paid Rs.2 lakhs as advance and they have paid subsequent on the date of agreement Rs.1,44,500/-. They have further paid to N. Valakrishnan a sum of Rs.1,18,336/- and claim interest of Rs.70,800/-. The sum so paid is Rs.5,33,736/-. The non payment of part of this amount is implied in the very averment because it is claimed that a sum of Rs.70,000/- represent interest on amount said to have been paid to Balakrishnan. What is relevant in this context is that even assuming that there was a payment of Rs.5,33,736/- towards the sale consideration what remains is Rs.7,66,264/-. The plaint is silent about making any offer of this amount at any point of time. The loss in the alleged partnership between the plaintiffs and the defendants 2 to 8 is Rs.2,75,368/- and that this defendant is liable to pay this amount and if this amount is also brought to the account of this defendant the balance remaining is Rs.4,40,896/-. According to the averment in the plaint this amount was not paid and this amount being a notional loss of a non existent firm to which even according to the plaint averment this defendant was not a party has been accounted in relation to the sale consideration. The only basis for such accounting is that the other defendants are the plaintiffs' benamidars in the partnership firm. The very claim is illegal. The payment of Rs.2 lakhs as advance and the payment of Rs.1,44,500/- are all denied. The accounting for Rs.1,89,236/- as if the plaintiffs had cleared the promissory notes for Rs.40,000/- from N. Balakrishnan is really extraordinary. The claim for this amount as if paid to N.Balakrishnan and that has been adjusted in the sale

consideration is indeed a deliberate falsehood. In the absence of a specific authorisation to adjust any amount due and in the absence of any order of binding nature issued by any court of law the claim for adjustment of amount said to have been paid to promisee in the sale consideration cannot be considered as discharging the obligation of the purchaser under the contract of sale. A payment if not authorised is not binding and a payment to a third party if voluntary is also not binding. This defendant denied that the original documents were deposited as collateral security for the advance paid and other amount to be paid. It is true that the demolition work was started, but then as the contract was abandoned that work also was stopped and this defendant continues to be in possession of the suit property. The contractor is still occupying the entire area is a false one. The agreement being prior to the order of attachment there is no legal bar against the plaintiffs to enforce the agreement. The plaintiffs did not pay demolition fee and an amount for the preparation of plan and for approval expenses. The allegation that this defendant postponed the renewal of the promissory note as security and as guarantor the plaintiffs paid the principal and interest before the expiry date and got the necessary endorsements and receipt for claiming from the first defendant is denied as false. The claim for interest of Rs.70,800/- is unsustainable and illegal. The allegation that the plaintiffs stood guarantee for the repayment of the loan under the promissory note is denied. The promissory notes were time barred. The plaintiffs were not authorised to make payment to the promisee. The statement as made by the plaintiffs in the plaint that they undertook to clear the balance of sale consideration within 18 months from the date of handing over of the vacant site for construction is not correct. The clause relating to payment of interest is also mis-interpreted. This defendant is not liable to execute the sale deed either to the plaintiffs or to their nominees or allottees. The allegation that the first plaintiff is the main party to arrange the negotiation of the purchase and the plaintiffs alone paid the entire consideration is not admitted and is a matter between the partners. The other partners are not bound to contribute any capital is also not correct. The statement in the notice dated 25.6.19 87 is true. Mrs.D'Monte and her children retired from the partnership is not admitted. The plaintiffs' claim of Rs.2,77,368/- against this defendant is unsustainable in law. In any event the claim cannot be made against this defendant because this defendant is not a party to the partnership. It is denied that there were negotiations between the plaintiffs and the first defendant and it is also denied that this defendant wanted to give up their family claim of profit if a lump sum is paid into the credit of an appeal against the company petition and wanted to share the profit in appreciation of the land value if sold to third parties. The claim that there is part performance of agreement is totally incorrect. The allegation that the plaintiffs are entitled to file a suit for specific performance under Article 54 of the schedule of the Limitation Act is also denied. It is not admitted that the defendants 2 to 8 are benamis for this defendant. In the partnership there was loss and that even assuming there was loss, such loss could be mulcted on this defendant. Such loss could be adjusted against the sale consideration. Hence, for all the above reasons, the suit has to be dismissed with costs.

4. The first defendant filed further additional written statement stating that for the plaint filed in 1990, now only by way of amendment in

1995, the plaintiffs state about their readiness and willingness to specifically perform the contract; that it exposes the lack of bona fides on the part of the plaintiffs and it shows that from the inception they have not been so ready; that the relief for damages as an alternate remedy is for breach of contract dated 13.5.1981, and hence, this claim is barred by limitation because the amendment was allowed on 23.4.1998. Hence the claim is to be rejected.

5. On the above pleadings by the respective sides, the following issues were framed:

1. Whether the suit is barred by limitation?
2. Whether the suit is liable to be dismissed for want of compliance with Section 16(c) of the Specific Relief Act?
3. Whether the suit by three out of 12 purchasers for specific performance of the contract where 9 purchasers have repudiated the contract maintainable?
4. Whether the plaintiffs were ready and willing to perform their part of the contract dated 13.5.1981?
5. Is it true that the plaintiffs have abandoned the contract?
6. Is it true that the plaintiffs paid a sum of Rs.2,00,000/- as advance?
7. Whether the payment of Rs.1,44,500/- alleged by plaintiff is true?
8. Whether the plaintiff is entitled to adjust the sum payable under the promissory note dated 23.8.1981, 21.12.81 and 5.1.1982 towards the sale consideration?
9. Whether the claim for interest in the sum of Rs.70,800/- sustainable?
10. Whether the plaintiffs have resources to purchase the suit property?
11. Whether the plaintiff has carried out his part of the agreement?
12. Whether the defendants 2 to 8 are not name-lenders for 1st defendant?
13. Whether the profit or loss has to be carried out in the account of the first defendant?
14. To what relief is the plaintiff entitled to?

6. ISSUES 1 TO 14:

The plaintiffs have filed this suit seeking the relief of specific performance of an agreement of sale dated 13.5.1981 or in the alternative to direct the defendants to specifically perform the terms of the joint venture agreement dated 13.5.1981 on payment of balance of Rs.4,90,896/- or in the alternative to direct the defendants to pay to the plaintiffs a sum of Rs.8,09,204/- with interest at 24% from the date of plaint till the date of realisation and consequential injunction. The contesting first defendant has opposed the suit on the grounds that the suit is hit by law of limitation; that the suit is liable to be dismissed since the contract of sale is between the first defendant on one hand and the 13 persons on the other hand as joint purchasers; that the plaintiffs were never ready and willing to perform their part of the contract; that a payment if not authorised, is not binding, and a payment to a third party if voluntary, is also not binding; that the agreement being prior to the order of attachment, there is no legal bar against the plaintiffs to enforce the agreement; that the first defendant is not liable to execute the sale deed either to the plaintiffs or to their nominees or allottees; that the relief for damages as an alternate remedy is for breach of contract dated 13.5.1981; and thus, the suit has to be dismissed.

7. On the side of the plaintiffs, P.W.1 was examined, and Exs.P1 to P9 were marked. On the side of the defendants, D.W.1 was examined and Exs.D1 to D7 were marked.

8. Arguing for the first plaintiff, the learned counsel would submit that the plaintiffs have filed the suit for specific performance of an agreement of sale dated 13.5.81 marked as Ex.P2 entered into with the first defendant who is the owner of the suit property situated in Door No.15, 16 and 17, Wallers Road, Madras 2; that the plaintiffs, their mother Indrani, one Padmanabhan along with the wife of the first defendant Mrs.D'Monte and the defendants 2 to 8, who are the children of the first defendant entered into an agreement of sale with the first defendant; that on the same day, the plaintiffs, their mother Indrani, Mr.Padmanabhan and Mrs.D'Monte and her children constituted a partnership firm for construction of a commercial complex in the suit property; that the said document is marked as Ex.P1; that a perusal of the same would clearly reveal that the defendants 2 to 8 were not required to invest any amount and were taken as partners at the suggestion of the first defendant for protecting his interest, as per the partnership deed; that the first defendant as DW1 has categorically admitted this fact also; that the plaintiffs, their mother and an Engineer Padmanabhan were required to invest for the purchase of the suit property and also for construction purposes; that as per Ex.P2 sale agreement, the first defendant received Rs.2.00 lacs on the date of the agreement; that he should demolish the existing building within a period of two months from the date of the agreement and hand over possession; that the balance of consideration was payable within 18 months from the date of delivery of vacant site; that the first defendant demolished only a part of the property, and he could not proceed with the demolition in view of an order of attachment by the court in the proceedings initiated by his creditors; that in view of the non completion of the demolition, the demand for payment of the balance of consideration has not arisen; that despite the same, the plaintiffs have paid major part of the consideration; that even if there was any delay in payment, the balance of sale consideration shall carry interest at 18% per annum; that without delivering vacant possession, the first defendant sent a notice under Ex.P5 on 25.6.1987 and informed that the agreement of sale was abandoned and unenforceable for the lapse of time; that on receipt of the said notice, the plaintiffs through their counsel sent a reply on 3.7.87 under Ex.P4; that the first defendant sent Ex.P5 rejoinder on 20.8.87; that since the first defendant did not come forward with the execution of the sale deed, the plaintiffs were constrained to file the suit; that the plaintiffs have proved that they were ready and willing to perform their part of the contract from the date of agreement till date, and thus, the plaintiffs have come forward to get the relief with clean hands. Added further the learned counsel that the sale consideration was fixed at Rs.13.00 lacs; that the first defendant has received a sum of Rs.2.00 lacs as advance and the balance amount was payable within 18 months from the date of delivery of the vacant possession; that the plaintiffs have further paid Rs.1,44,500/- on various dates as evidenced by Ex.P6 series and have also discharged various amounts which the first defendant was liable to pay to one Balakrishnan and others and have filed the discharged promissory notes under Exs.P7, P8 and P9; that the first plaintiff has also stood as guarantor for those loans also; that the first defendant by a communication addressed to the counsel for the plaintiffs have authorised to discharge all those debts, which was accordingly done, and hence, the first defendant cannot be permitted to say that he did not authorise the plaintiffs to discharge the debts; that though the plaintiffs executed the agreement of

sale along with the other persons, they were entitled to claim for specific performance, since their mother Indrani, the Engineer Padmanabhan and Mrs.D' Monte have died; that with respect to the other parties shown as defendants 2 to 8 in the suit, since they are not required to invest any amount for the purchase of the suit property, they need not be joined with the plaintiffs either to prove the genuineness of the agreement or to prove the readiness and willingness; that they were the nominees of the first defendant, and hence, they could not be expected to join with the plaintiff, and hence, the court has to take into consideration the conduct of the plaintiffs who have been ready and willing to perform their part of the contract and not that of the defendants 2 to 8; that it remains to be stated that though the plaintiffs constituted the partnership firm under Ex.P1 on 13.5.1981, the agreement for sale was not executed by the firm represented by its partners; that the agreement for sale was only by 13 individuals out of whom three died, seven have been added as defendants 2 to 8 and three parties have filed the suit as plaintiffs 1 to 3; that according to Ex.P3, the legal notice dated 25.6.87, the defendants 2 to 8 as per their letter dated 23.6.87 were claimed to have abandoned the business venture; that the retirement of some of the partners from the firm will not ipso facto dissolve the firm or make the other partners not to continue the joint venture, and thus, the plaintiffs are entitled to the specific performance, and under such circumstances, the contention of the first defendant that the three plaintiffs cannot maintain the suit is baseless and unfounded. Added further the learned counsel that according to the plaintiffs, they have paid a total sum of Rs.8,09,204/-, and the balance amount payable was Rs.4,90,846/-; that the plaintiffs have paid Rs.2.00 lacs by way of advance, Rs.1,44,500/- on different dates towards further sale consideration, and Rs.1,18,336/- towards the discharge of pronote liabilities, and thus, the plaintiffs have paid a total sum of Rs.5,33,736/-, and the balance of Rs.2,75,468/- represented the interest for the said amounts; that however, with respect to the balance amount payable by the plaintiffs, the court has to fix the same, and the plaintiffs are ready and willing to pay the said amount; that the plaintiffs were ready and willing to perform their part of the contract from the date of the agreement; that in fact the plaintiffs submitted the building plan to the Madras Metropolitan Development Authority and the Corporation authorities in February and March 1982 for necessary approval; that it is admitted by the first defendant in his letter dated 11.5.83 that building plan has already been submitted; that further things have to be done only after the delivery of vacant site by the first defendant; that the first defendant has not delivered the vacant possession till date; that under the circumstances, the plaintiffs are entitled to purchase the suit property; that as per the partnership deed, the defendants 2 to 8 and their mother as nominees of the first defendant, have been offered 50% share in the profit and loss; that if the first defendant pleads that in case of joint venture his nominees who are defendants 2 to 8 will be benefited, the plaintiffs have alternatively claimed for specific performance of the agreement; that the plaintiffs have come with clean hands, and thus, if the relief of specific performance is denied, the specific performance for joint venture agreement has to be decreed; that only because of the joint venture agreement, in Clause 1 of the Agreement of Sale, the delivery of title deeds has been referred as delivery of title deeds by way of security; that only under the legal notice dated 25.6.87 under Ex.P3, the first defendant wriggled

out of the contract; that the suit having been filed on 20.2.1990, is well within limitation; that since the first defendant addressed a letter under Ex.D7 dated 11.5.83 to the father of the plaintiffs to do certain things, there is no question of denial of performance of the contract; and that for all the above reasons, the suit has to be decreed.

9. Arguing for the plaintiffs 2 and 3, the learned Senior Counsel Mr.R.Krishnaswami would submit that the suit property belonged to the first defendant; that the purpose of the agreement was to develop the property, thereby providing shares to the children of the first defendant and the remaining share to the plaintiffs; that the agreement under Ex.P2 provides that on payment of Rs.2 lacs, the first defendant should provide all the original documents relating to the property and within two months, he should demolish the existing building and deliver vacant possession; that within 18 months after the demolition of the building and handing over of vacant possession by the first defendant, the building should be completed; that there is no clause for foreclosure of the agreement, nor was there any condition to cancel the agreement in case of any breach by the plaintiffs; that in toto the plaintiffs have paid to the first defendant a sum of Rs.5,33,736/-; that further the plaintiffs have claimed loss in the partnership, since the children of the first defendant retired from the partnership unilaterally as and from 23.6.1987; that the said loss was estimated at Rs.2,75,368/-; that it is pertinent to note that the agreement between the parties is admitted; that the agreement under Ex.P2 relates only to sale of vacant site; that there is a breach by the first defendant; that since the delivery of possession is not effected as per the agreement, the plaintiffs are not obliged to make any further payment; that it has to be noted that there is no breach on the part of the plaintiffs; that the first defendant relies upon the letter dated 11.5.83 addressed to the plaintiffs' father, who was not a party to the agreement; that the contents of the said letter dated 11.5.83 are contrary to the terms of Ex.P2; that this letter does not say any refusal to perform as it purports to be demand for payment; that there is no evidence available for inferring abandonment by the plaintiffs; that after attachment was raised, to which the plaintiffs have no notice, the first defendant wanted to avoid the agreement and, therefore, the 1st defendant complained of abandonment of the agreement; that since the negotiations for compromise failed, the present suit was instituted; that it is pertinent to note that only in 1987, when the notice was issued, the receipt of Rs.2 lakhs is disputed; that the existence of the loans is not denied by the first defendant; that the plaintiffs have proved the discharge of those loans by producing documentary evidence; that PW1 has categorically stated that the plaintiffs were ready to pay the balance of consideration as per the terms of the agreement, and hence, it can be well stated that the plaintiffs were ready and willing to perform their part of the agreement; that the readiness and willingness would mean the obligations of the plaintiffs to perform from the date of suit and thereafter; that in the instant case, the plaintiffs have never denied their part of obligations to perform under the agreement; that the law does not require deposit of the entire balance amount or showing the resources for making payment of the balance; that the decisions of the Apex Court reported in 1997(4) SCC 481 and 2000 (6) SCC 420 are applicable to the present facts of the case with regard to readiness and willingness of the plaintiffs; that it has to be noted that the adequacy of

compensation cannot be substituted for the relief of specific performance; that the suit is not barred by limitation; that the plaintiffs have filed the suit in their capacity as agreement holder and not representing the partnership firm; that it is not the case of the defendants that Ex.P2 agreement was entered into with the partnership; that it is only a matter between the plaintiffs and the first defendant as the first defendant himself has admitted in evidence that his children the defendants 2 to 8 are parties to the agreement only to safeguard his interest; that the children of the first defendant are entitled to share of allotment and not allotment under Ex.P2, and thus, the suit is maintainable; and therefore, the suit has to be decreed as prayed for.

10. Countering to all the above contentions of the plaintiffs' side, the learned Counsel for the contesting first defendant would argue that it is true that the first defendant entered into an agreement for sale in respect of his properties situated in Door No.15, 16 and 17, Wallers Road, Madras 2 for a consideration of Rs.13 lacs on 13.5.81, which is marked as Ex.P2; that apart from the three plaintiffs, their mother Indrani, one Engineer by name Padmanabhan, the wife of the first defendant and defendants 2 to 8 who are the children of the first defendant have also signed the same; that of the 13 persons who constituted the second part, Indrani, the mother of the plaintiffs 1 to 3 and the Engineer Padmanabhan and the 8th purchaser Mrs.D'Monte were dead; that the rest of the purchasers 7 to 13 who are shown as D2 to D8 have abandoned the contract consequent to the termination of the partnership firm entered into between those 13 persons under Ex.P1; and under such circumstances, 3 out of 13 purchasers cannot maintain a suit for specific performance, and on that ground, the suit has got to be dismissed. Added further the learned counsel that the suit is also barred by limitation; that though it is recited under Ex.P2 sale agreement that Rs.2 lacs was paid as advance, no such sum was paid on the date of agreement; that according to the first defendant, a sum of Rs.1,05,000/- was paid on different dates prior to the said agreement; that since the plaintiffs did not pay even the advance amount as found under Ex.P2 agreement, the first defendant was constrained to send a communication under Ex.D7 dated 11.5.83, wherein he has clearly spelt about the breach of the contract made by the plaintiffs, and he has made his intention to repudiate the contract very explicit; and hence, the plaintiffs should have filed the suit within a period of three years therefrom, but they have filed the suit nine years after Ex.P2 agreement, and hence, the suit has got to be dismissed not only on the question of limitation, but also for laches on the part of the plaintiffs. Added further the learned counsel that admittedly the partnership firm under Ex.P1 was not a registered one, and hence, the suit filed by the plaintiffs is not at all maintainable; that it is true that as per Ex.P2 agreement, the first defendant undertook to complete the demolition of the existing construction within a period of two months, but he did not do so in view of the fact that Narayanaswami, father of the plaintiffs had not paid the advance amount; that it is not correct on the part of the plaintiffs to state that the demolition could not be completed due to the court attachment and also because the property was kept under the lock and key; that it is pertinent to note that the attachment did not continue up to a certain period; that the undertaking given by the first defendant under Ex.P2 agreement regarding the demolition of the existing construction had relevancy with the payment of advance amount; that it was not understood between the

parties that the payments were to be made only after the handing over of possession; that on the date of the agreement, the first defendant had handed over the title deeds of the suit property to the plaintiffs; that it is true that the first defendant had received those amounts found under Ex.P6 series; that the father of the plaintiffs Narayanaswami alone was in charge for the entire activities; that the first plaintiff examined as PW1 has admitted in his evidence that he was doing his college course during the relevant period, and hence his evidence that he had discussion with the first defendant in respect of the sale of the property is false and has got to be rejected; that the plaintiffs were never ready and willing to perform their part of the contract; that only a sum of Rs.1,05,000/- out of Rs.2 lacs recited under Ex.P2 agreement as advance was paid, and hence, the first defendant has not received Rs.95,000/- which formed part of the said advance; that the first defendant never authorised the plaintiffs to discharge any debts, and the claim of the plaintiffs that they have discharged three promissory notes under Exs.P7, P8 and P9 was false; that it is pertinent to note that the creditor Balakrishnan was the uncle of the plaintiffs, and hence, the alleged discharge of the debts by the plaintiffs should not be taken into consideration for the simple reason that those discharge was not at all authorised by the first defendant; that apart from the same, the plaintiffs have calculated the interest to the tune of Rs.70,000/- on those principal amounts; that it remains to be stated that the said sum of Res.,18,00 0/- alleged to have been paid by the plaintiffs to the third party creditors would represent only a part of the sale consideration, which cannot carry any interest; that apart from the above, the plaintiffs have also adjusted a sum of Res.,75,368/- stating that it represents the loss sustained by them, and thus, the plaintiffs have averred that after making the above adjustments, they are ready and willing to pay Res.,90,846/- and seeking the orders of this court to direct the first defendant to execute the sale deed; that this would clearly indicate that the plaintiffs have come with a false case; and hence, on the two grounds that the plaintiffs were not ready and willing to perform their part of the contract by paying the balance of consideration as understood between the parties; and that they have come with a false case, the court has to necessarily refuse the equitable relief of specific performance; that apart from that during the relevant period, they had no sufficient source of income or capacity to pay the balance of consideration; that Ex.P1 agreement recites that the capital of the partnership was only Rs.60,000/- to be contributed by the parties 1 to 5th part equally, and thus, this would indicate that each was to contribute only Rs.12,000/-; and that this would show that the plaintiffs to start with, had no sufficient funds at all. Added further the learned counsel that the contention of the plaintiffs that the first plaintiff stood as guarantor for the loan amounts availed by the first defendant was an utter falsehood; that even as per Ex.P2 document, all the title deeds were handed over to the plaintiffs; that as per the copy of the plaint in O.S.No.7022/87 marked as Ex.D3, filed by the first plaintiff against the first defendant for recovery of money, it was stated that the title deeds were deposited by the first defendant to Balakrishnan as collateral security; that it is pertinent to note that the said suit was dismissed for default, but the first plaintiff has not taken any steps to restore the same, and thus, the plaintiffs who have not been ready and willing to perform their part of the contract from the very beginning, have come forward for the equitable relief of specific performance

with unclean hands, and hence, they are not entitled for the reliefs, asked for; that apart from that the suit is also not maintainable in law, and hence, the suit has got to be dismissed.

11. Admitted facts by the parties can shortly be stated as follows:

The plaintiffs 1 to 3 are the sons of one Mr.A.Narayanaswami, who was a practising Advocate. The first defendant is the owner of the plaint Schedule property. The defendants 2 to 8 are the sons and daughters of the first defendant. The plaintiffs 1 to 3, their mother Ingrain, an Engineer by name Padmanabhan and the defendants 2 to 8 and their mother entered into an unregistered Partnership Agreement marked as Ex.P1 only with the object of promoting a commercial complex in the property at door No.15, 16 and 17, Wallars Road, Narasimhapuram, Madras 2. All the said 13 persons who constituted the said partnership entered into an agreement of sale marked as Ex.P2 with the first defendant on 13.5.81 in respect of the suit property. The sale consideration was fixed at Rs.13,00,000/-. Under the said agreement, the first defendant undertook to demolish the existing superstructure within two months' time and hand over vacant possession. The vacant possession of the property was not handed over by the first defendant to the other party. A part of the superstructure has been demolished, while the demolition in respect of the other part is incomplete. The first defendant sent a registered letter to Mr.Narayanaswami on 11.5.83 as found under Ex.D7. The first defendant issued a notice through his lawyer on 25.6.87 under Ex.P3. The father of the plaintiffs Mr. Narayanaswami in his capacity as Advocate, has issued Ex.P4 reply notice dated 3.7.87 to the first defendant, which resulted in a rejoinder from the first defendant under Ex.P5. The plaintiffs have filed the suit on 20.2.1990 seeking for the above said reliefs.

12. The plaintiffs 1 to 3, their mother Indrani, an Engineer by name Padmanabhan and the defendants 2 to 8 who are the children of the first defendant and the wife of the first defendant all entered into Ex.P1 partnership agreement on 13.5.1981. Pursuant to the same, all the 13 persons entered into Ex.P2 agreement of sale with the first defendant on the same day in respect of the suit Schedule properties, situated in Door Nos.15, 16 and 17, Wallers Road, Madras which belonged to the first defendant. Concededly, the partnership entered into between the said 13 persons including the plaintiffs herein, was an unregistered one. The plaintiffs have specifically averred in the plaint that the said agreement for sale under Ex.P2 was entered into between the first defendant who constituted the first part and the above 13 persons as the second part; that under the partnership deed, the first plaintiff was the main party who arranged negotiation of purchase; that their mother Indrani died on 5.2.1983; that the Engineer Padmanabhan also died subsequently; that Mrs.D'Monte and her children have retired from the partnership, and hence, the plaintiffs are entitled to get the relief of specific performance against the first defendant on the basis of the sale agreement executed by him. A reading of Ex.P1 partnership deed would go to show that the main object of the partnership was to promote a commercial complex at No.15, 16 and 17, Wallers Road, Madras 2. Pursuant to the said partnership deed and with the said object, all the 13 individuals have entered into Ex.P2 sale agreement with the first defendant. P.W.1 has categorically admitted that the business of the said partnership was a single venture for promoting the commercial complex at No.15, 16 and 17, Wallers Road, which was the subject matter of Ex.P2 agreement. The witness has further added that the

said partnership under Ex.P1 is still alive, and the same is constituted by himself and his two brothers, who are the plaintiffs 2 and 3, as the partners of the said partnership firm, and the others have retired from the firm, and hence, himself and his two brothers have filed the present suit. Hence, the contention of the plaintiffs' side that the agreement of sale was entered into by 13 individuals only cannot be countenanced.

13. The defendants 2 to 8 by a letter dated 23.6.1987 as found under Ex.D2 series, have expressed in clear terms that they have abandoned the business venture. At the time of arguments, the learned Counsel for the plaintiffs would submit that the retirement of some of the partners from the firm would not ipso facto dissolve the firm or make the other partners not to continue the joint venture, and hence, the plaintiffs are entitled to get the relief of specific performance. All the above would go to show that even as per the pleadings and the evidence, the partnership firm, originally entered into between the parties despite the death of two of the partners and the retirement of or abandonment by eight of the partners, continues to exist with the plaintiffs as partners, and thus, they are entitled to the relief of specific performance. The court may hasten to say at this stage that the plaintiffs cannot maintain the suit for specific performance in view of the two legal impediments. Firstly, the partnership firm was an unregistered one, which in view of the rulings cited infra cannot institute or maintain a suit.

The Apex Court has held in a decision reported in AIR 1977 SUPREME COURT 336 (LOONKARAN SETHIA VS. MR. IVAN E.JOHN AND OTHERS) thus:

"Partnership Act (1932), S.69 - Bar under - Applicability.

Section 69 is mandatory in character and its effect is to render a suit by a plaintiff in respect of a right vested in him or acquired by him under a contract which he entered into as a partner of an unregistered firm, whether existing or dissolved, void. In other words, a partner of an erstwhile unregistered partnership firm cannot bring a suit to enforce a right arising out of a contract falling within the ambit of Section 69."

In a decision reported in 1999 (II) C.T.C. 540 (M/S.K.R.M.MONEY LENDERS REP.BY ITS POWER AGENT KARUPPIAH VS. A.MANO HARAN @ DOSS), this court has held thus:

"Partnership Act, 1932, section 69(2) - Suit instituted by partnership firm which was unregistered on date of institution of suit - Firm subsequently registered - Subsequent registration of firm does not cure defect of non-registration before presentation of suit - Nonregistration of firm is illegality going to root of suit and plaint is itself non-est in law - Firm instituting suit should establish that firm is registered and disclose particulars of partners who constitute firm on date of institution of suit.

Code of Civil Procedure, 1908, Order 7, Rule I - Plaint and Pleadings - Defect in filing suit by unregistered firm goes to root of suit and Court is bound to consider same even if defendants had failed to raise such objection - Court has to reject plaint if barred by law - Suit by unregistered firm barred under Section 69(2) of Partnership Act - Suit to be rejected and plea of waiver of such objection by defendants is of no avail."

Secondly, while the agreement under Ex.P2 for the sale of the property was entered into by 13 persons, who were the partners of a firm constituted under Ex.P1 with the sole object of promoting a commercial complex in the property, which is the subject matter of sale, the plaintiffs cannot legally enforce the said agreement of sale in the absence of the other 10 persons consenting for

such an enforcement of the agreement. Except two of them who were dead, the other 8 persons not joined the plaintiffs in filing the suit, but have abandoned the joint venture. By doing so, no doubt, the defendants 2 to 8 have expressed their disinclination to proceed with the agreement for sale.

14. As could be well seen from Ex.P2 agreement for sale, the sale consideration was fixed at Rs.13.00 lacs. According to the plaintiffs, the first defendant received an advance of Rs.2.00 lakhs from the plaintiffs on the date of the said agreement viz. 13.5.1981. Refuting the same, it is contended by the first defendant that actually no amount was paid on the date of the agreement; that only a sum of Rs.1,05,000/- was paid on different dates on the earlier occasion; and that this was also stated by the first defendant in his letter under Ex.D7 dated 11.5.83. Ex.P2 agreement for sale clearly recites that the first defendant has received a sum of Rs.2,00,000/- as advance on the date of the agreement from the parties 1,2, 3 and 4 of the second part and handed over all the original documents, which would remain as collateral security for the advance and other amounts to be paid. Had it been true that the first defendant received only Rs.1,05,000/- prior to Ex.P2 agreement and did not receive any amount on the date of the agreement, the first defendant would not have been a party for such recital being included in the agreement. In the face of the clear recital as to the receipt of Rs.2,00,000/- by the first defendant on the date of Ex.P2 agreement, the contention of the first defendant that he received only Rs.1,05,000/- that too before the agreement, and no amount was paid on the date of the agreement has got to be rejected. It cannot be disputed by the plaintiffs that excepting this advance amount of Rs.2.00 lacs, they were liable to pay Rs.11.00 lacs towards the balance of sale consideration as per the agreement. According to the plaintiffs, they are liable to pay only Rs.4,90,896/- towards the balance of consideration. It would be more appropriate to reproduce the relevant part of the plaint averments in this regard:

"8(a) To direct the defendants to specifically perform the terms of the joint venture agreement dated 13.5.1981 on payment of the balance sum of Rs.4,90,846/- by the plaintiff to the defendant....

11. The plaintiffs therefore pray for a decree and judgment against the defendants--

a) for specific performance of the agreement dated 13.5.1981 and direct the defendants to execute the sale deed in favour of the plaintiffs or their nominees by one or more sale deeds as per the terms of the agreement on payment of the balance of consideration of Rs.4,90,896/-....."

15. From the above averments, it would be abundantly clear that the plaintiffs were ready and willing to perform their part of the agreement by paying the balance of consideration of Rs.4,90,896/-. P.W.1 has deposed that after the payment of the initial amount of Rs.2.00 lacs, they have paid a sum of Rs.1,44,500/- on different dates. A perusal of Ex.P6 receipts would clearly indicate that the first defendant has acknowledged the receipt of the said sum of Rs.1,44,500/- on different dates. The first plaintiff has further added that the first defendant borrowed moneys from Balakrishnan; that he stood as guarantor for the said transactions; that subsequently he made those payments to Balakrishnan; that in that way, he has paid Rs.1,18,000/- towards the principal and the accrued interest thereon was Rs.70,000/-; and that totally a sum of Rs.1,89,000/- was adjusted in the sale consideration. It is

contended by the first defendant that he never authorised the plaintiffs to discharge those debts, which he was liable to pay to Balakrishnan and others. The first defendant even in his written statement and in evidence also has specifically averred that he had negotiations only with Mr.Narayanaswami, father of the plaintiffs and has actually entered into the agreement with him. The first defendant has well admitted that he wrote a letter under Ex.D7 to Mr. Narayanaswami, wherein he asked him to take steps to adjust the loan amounts introduced by him. The plaintiffs have filed the original promissory notes executed by the first defendant in favour of the creditors containing the endorsement of discharge by the respective creditors by receiving the principal and interest thereon. In view of the request made by the first defendant under Ex.D7 letter, now the first defendant cannot be permitted to say that he did not authorise the discharge of the debts either, or those payments would not bind him. According to the plaintiffs, they have calculated the interest at the rate of 24% on Rs.1,18,000/- which worked out to Rs.70,000/- up to January 1990, and the same has also got to be adjusted in the sale consideration. It remains to be stated that the said payments of Rs.17,200/- Rs.34,400/- and Rs.17,200/-, totalling Rs.68,800/- made by the plaintiffs under Exs.P7, P8 and P9 respectively to the different creditors would represent a part of the sale consideration, and hence, at no stretch of imagination, it could carry any interest. Thus, the plaint averments and the evidence of PW1 stating that the said interest amounting to Rs.70,000/- was to be adjusted in the sale consideration are not only against the terms of the agreement under Ex.P2, but also illegal.

16. In order to arrive at the said balance of consideration of Rs.4,90,896/-, the plaintiffs have also averred that as per the partnership agreement dated 13.5.1981, the other partners Mrs. D'Monte and her children on their retirement were to share the profit and loss; that in the reply dated 3.7.87, the plaintiffs claimed Rs.2,77,368/- as loss from the defendants giving the account stating that the plaintiffs have paid a total sum of Rs.3,44,500/- as per the agreement towards the sale consideration, which would carry interest at 18% from the date of investment which worked out to Rs.4,82,400/-, and the same has also to be adjusted in the sale consideration. This averment of the plaintiffs to adjust Rs.2,77,368/- as loss from the defendants stating that the plaintiffs have paid a total sum of Rs.3,44,500/- as per the sale agreement towards the sale consideration would clearly reveal that the agreement for sale would go against the contention of the plaintiffs that the sale agreement was entered into only by 13 individuals and not by the partners of the firm. It is pertinent to note that the first defendant, who was the owner of the property, was not a party to the partnership deed dated 13.5.81, nor has he agreed to share the profit or loss with the partnership firm. The said unregistered partnership deed was entered into between the plaintiffs and others with the sole object of promoting a commercial complex in the suit property. It is an admitted position that except entering into the said partnership deed under Ex.P1, the joint venture thereunder did not fructify. It has to be noted that the two of the partners died, and eight of the partners who are the defendants 2 to 8 and Mrs.L.T.D' Monte by a letter dated 23.6.87 under Ex.D2 have stated that the business venture contemplated in the year 1981 has been abandoned, and the contract entered into with the first defendant has also been abandoned. Even assuming that the plaintiffs have sustained any loss in view of the conduct of the other partners, they can

have recourse only against them and not against the first defendant, who had nothing to do with the partnership firm.

17. On receipt of a notice from the first defendant under Ex.P3 dated

25.6.87 stating that Mrs.D'Monte and her children abandoned the business and the agreement, a reply under Ex.P4 dated 3.7.87 was sent by Mr.Narayanaswami on behalf of his sons. Ex.P4 reply reads as follows:

"....N.Venkatesh and his brothers N.Kasi Visvanathan and N.Ramesh are willing and competent to complete the contract with your client and they are quite willing to pay the balance of consideration....."

A very reading of the above reply notice would make it abundantly clear that the plaintiffs have expressed their readiness and willingness to pay the balance of consideration after adjusting the payments to the creditors, interest thereon and the alleged loss sustained by the retirement of the partners of the firm. It is a matter of surprise to note that how the plaintiffs were entitled to adjust the interest on the payments made to the creditors, which would represent a part of the sale consideration and would make further adjustment by way of loss sustained by the plaintiffs on account of the retirement of the partners in a firm in which the first defendant has nothing to do. The averments made by the plaintiffs through their counsel under Ex.P4 reply notice which preceded the suit would clearly reveal that the plaintiffs were ready and willing to pay only Rs.4,90,896/-, after making the adjustments as per their desires and not in accordance with the terms of the agreement.

18. It is pertinent to note that when the original plaint was presented in the instant suit, it did not contain the requisite pleading that the plaintiffs were always ready and willing to perform their part of the contract to satisfy the mandatory provision of S.16(c) of the Specific Relief Act. Subsequently, the same was rectified by way of an application for amendment in Application No.959/98 dated 23.4.1998, which resulted in introduction of paragraph 8(a) in the plaint. As stated above, in paragraph 8(a) of the plaint, the plaintiffs have clearly stated that they were ready and willing to specifically perform the agreement on their part, and nowhere in the plaint, they have stated that they were ready and willing to pay the balance of consideration as per the terms of the agreement. But they have expressed their readiness and willingness to perform their part of the agreement by paying the balance of consideration, which according to them was only Rs.4,90,896/-. In view of the reply notice under Ex.P4 and the clear averments in the plaint, the plaintiffs cannot now be permitted to say that they were ready and willing to pay the balance of consideration, as per the terms of the agreement, and that the court may fix the balance of consideration and grant equitable relief in their favour. Needless to say that the specific performance of a contract cannot be enforced in favour of a person, who fails to aver and prove that he has always been ready and willing to perform the essential terms of the contract including the payment of consideration, which are to be performed by him. The court is of the view that the decisions of the Apex Court reported in AIR 1995 SUPREME COURT 945 (JUGRAJ SINGH AND ANOTHER VS. LABH SINGH AND OTHERS) and in AIR 1996 SUPREME COURT 116 (N.P.THIRUGNANAM (D) BY L.Rs. VS. DR.R.JAGAN MOHAN RAO AND OTHERS) and of the Division Bench of this Court reported in (1994) II M.L.J. 78

(S.S.CHOKKALINGAM VS. R.B.S.MANI AND OTHERS) cited infra are applicable to the present facts of the case. In the said decisions it has been held as follows:

AIR 1995 SC 945:

"Section 16(c) of the Specific Relief Act 1963 provides that the plaintiff must plead and prove that he has always been ready and willing to perform his part of the essential terms of the contract. The continuous readiness and willingness at all stages from the date of the agreement till the date of the hearing of the suit need to be proved. The substance of the matter and surrounding circumstances and the conduct of the plaintiff must be taken into consideration in adjudging readiness and willingness to perform the plaintiff's part of the contract."

AIR 1996 SC 116:

"To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract."

(1994) II MLJ 78:

"In the present case, it is clear that the appellant-purchaser has never been ready and willing to perform his part of the contract. It is well settled that a person cannot claim the relief of specific performance unless he proves his readiness and willingness to perform his part of the contract. It is also seen that the appellant has come to court with a false case that no time limit was fixed for completion of the transaction and that he was permitted to pay the sale price in dribblets. But the evidence clearly shows that the appellant himself fixed the time limit and the respondents (sellers) gracefully agreed to such extensions. In spite of such extensions, the appellant failed to perform his part of the contract. It is also seen that the appellant has put forward a false case that there was a panchayat. It is well known that a person who has come to court with a false case is not entitled to the equitable relief of specific performance."

If the abovesaid tests are applied, the court without any hesitation can very well say that the plaintiffs have failed to satisfy the mandatory provision of law under S.16 of the Specific Relief Act. Thus, it has to be necessarily held that the plaintiffs have neither averred nor proved that they were ready and willing to perform the said essential terms of the contract, which they are bound to perform. The first defendant is under no obligation to execute a sale deed in favour of the plaintiffs when they were not ready and willing to pay the balance of consideration as per Ex.P2 sale agreement, as quite evident from the reply notice under Ex.P4 dated 3.7.87 and the averments in the plaint regarding the balance of consideration. The contention put forth by the plaintiffs' side that with respect to the balance amount payable by the plaintiffs, the court has to fix the same, and the plaintiffs are ready and willing to pay the said amount cannot be countenanced. After seeing the allegations made by the plaintiffs in Ex.P4 reply notice and the averments made in the plaint regarding the balance of consideration, the court without any hesitation can find that the plaintiffs were never ready and willing to perform their part of the contract, as per the terms of the agreement relating

to the consideration for the sale. The law would require the readiness and willingness to perform on the part of the plaintiffs from the time of the agreement for sale till the completion of the proceedings in the court. The expression of readiness and willingness to make the payment as fixed by the court at the time of arguments will not in any way satisfy the said legal requirement stating that the plaintiffs seeking for the equitable relief of specific performance should be ready and willing from the time of agreement till the finalisation of the proceedings. In the instant case, the plaintiffs have not satisfied the said legal requirement.

19. In the absence of any material to hold that the plaintiffs have abandoned the contract, the contention of the first defendant that the plaintiffs have abandoned the contract cannot be countenanced. So far as the contention of the first defendant that the suit is hit by law of limitation is concerned, the court has to necessarily disagree with the defence. Ex.P2 agreement was dated 13.5.1981. Clause 2 of Ex.P2 reads as follows:

"2. The vendor undertakes to demolish within two months from this date and hand over vacant possession of the schedule mentioned property to the purchasers herein for starting their construction work."

It is well admitted by the first defendant that a part of the building was demolished, while the remaining part is in tact, and thus, it would be evident that the first defendant has not complied with the said term. Relying on Ex.D7 letter dated 11.5.83, the learned counsel for the first defendant would submit that the said letter would speak about the breach of the contract committed by the plaintiffs, and then the period of limitation commenced therefrom, and hence, the suit should have been filed within three years therefrom. As per Ex.P2 agreement, the liability of the plaintiffs to pay a further amount would start only after the demolition of the entire structure by the first defendant and delivery of possession. A reading of Ex.D7 letter would make it clear that the first defendant has asked Mr. Narayanaswami to take steps to adjust the loan amounts introduced by him as the first defendant was liable to discharge those loans. As seen above, the plaintiffs had discharged the loan amounts of the first defendant under Exs.P7, P8 and P9 promissory notes. Nowhere under Ex.D7, the first defendant has expressed his repudiation to perform his part of the contract. On the contrary, the first defendant has categorically admitted that he gave instructions to his lawyer K.T.Palpandian to issue a notice dated 25.6.87 as found under Ex.P3, and it was on that date, he decided to refuse to perform his part of the agreement, and only after that, he sent a notice under Ex.P3 to the plaintiffs. Thus, it would be clear that only on receipt of Ex.P3 notice, the plaintiffs were put on notice as to the refusal by the first defendant to perform his part of the agreement. Since the plaintiffs have filed the suit within three years therefrom, the suit is well within time.

20. According to the plaintiffs, the first defendant made borrowals from N.Balakrishnan and others and executed promissory notes on the guarantee of the first plaintiff and on the collateral security of the original documents. PW1 has deposed that he stood as guarantor for the above loan transactions, and on discharge of the same, he got back the promissory notes under Exs.P7, P8 and P9. Under the said three promissory notes, the first defendant has borrowed a sum of Rs.10,00 0/-, Rs.20,000/- and Rs.10,000/- on 25.8.81, 21.12.81 and 5.1.82 respectively. Ex.P2 sale agreement recites that the first defendant has handed over all the original documents as collateral

security for the advance and the other amounts to be paid. Thus, the said recital would indicate that all the original documents pertaining to the immovable property of the first defendant were already handed over to the plaintiffs even on 13.5.1981 itself. In all the three discharged promissory notes under Exs.P7, P8 and P9, the first plaintiff has made similar endorsements as follows:

"I stand guarantee for the payment of the above said principal and interest and deposit the title deeds with me relating to 15 & 16 & 17 Wallers Road as collateral security."

All these endorsements were made on the respective dates of the promissory notes. Since the original documents pertaining to the immovable property were handed over to the plaintiffs as found in the recital under Ex.P2 stated above, no question of handing over of those documents again on the respective dates of endorsements would arise. A perusal of Ex.D3, a certified copy of the plaint filed by the first plaintiff against the first defendant in O.S.No.7022/87, on the file of the City Civil Court, Madras, would reveal that the first plaintiff has filed a suit for recovery of a sum of Rs.26,488/- alleging that the first defendant had executed a promissory note on 25.8.81 for a sum of Rs.11,000/- wherein the first plaintiff stood as guarantor for the payment, and deposited the title deeds with him relating to Door Nos.15, 16 and 17 Wallers Road, as collateral security. As stated above, on the very date viz. 25.8.81, the first defendant has borrowed a sum of Rs.10,000/- and has executed Ex.P7 promissory note, and the first plaintiff has also made an endorsement that the first defendant has deposited the title deeds with him as collateral security. The first plaintiff has no explanation to offer why he filed the said suit against the first defendant for recovery of money without adjusting the said amount towards the sale transaction in question. The said suit was not prosecuted, and the same was dismissed for default and not restored. All the above would go to show that though the original documents were obtained by the plaintiffs as collateral security at the time of payment of advance under Ex.P2 on 13.5.81, the first plaintiff has made the said endorsements as if he received those documents as collateral security on the date of the promissory notes, which is against the true state of affairs.

21. Therefore, for the discussions made and reasons stated above, it has to be held that the plaintiffs are not entitled to the relief of specific performance of the agreement of sale under Ex.P2 dated 13.5 .1981. The plaintiffs have sought for an alternative relief of directing the defendants to specifically perform the terms of the joint venture agreement dated 13.5.81 on payment of the balance sum of Rs.4,90,846/-. The court is of the view that this alternative relief cannot go together with the relief of specific performance, and the same cannot be entertained in this proceedings. It remains to be stated that since the relief of specific performance is refused, granting of the said alternative relief will not be meaningful. So far as the other alternative relief of refund of the amounts paid by the plaintiffs is concerned, the court is of the considered view that there is no legal impediment in granting the said relief with interest, and hence, the first defendant is liable to pay Rs.4,13,300/- i.e. advance of Rs.2,00,000/-, further payment of Rs.1,44,500/- under Ex.P6 receipt and payment of Rs.68,800/- towards discharge of debts of the first defendant under Exs.P7, P8 and P9 promissory notes. As regards interest, considering the facts and circumstances of the case, the plaintiffs are entitled to get interest at 18%

per annum on Rs.2,00,000/- and Rs.1,44,500/- from 13.5.81 and on Rs.68,800/- (Rs.17,200/- + Rs.34,40 0/- + Rs.17,200/-) from the respective dates of payment as found under Exs.P7, P8 and P9 viz. 24.8.84, 20.12.84 and 1.1.85, till realisation. It has to be held that the plaintiffs are not entitled to the relief as found under prayer column (b). All the above issues are answered accordingly.

22. In the result, the plaintiffs are given a decree for a sum of Rs.4,13,300/- only together with interest at 18% per annum on Rs.3,44,5 00/- from 13.5.81, on Rs.17,200/- from 24.8.84, on Rs.34,400/- from 20.12.84 and on Rs.17,200/- from 1.1.85 till realisation and with proportionate costs. The first defendant is given two months' time for making the said payments. If the decree granted supra is not satisfied within two months, the amounts shall carry interest at 24% per annum from the date of expiry of two months till realisation. A charge is also created over the plaint schedule property till the decree is fully satisfied. The plaintiffs are directed to hand over the original documents of title in their hands to the first defendant or deposit the same into the court within a period of four weeks herefrom. In other respects, this suit is dismissed.

Index: Yes

Internet: Yes

25-7-2002

List of Witnesses:

1. P.W.1 M.N.Venkatesh
2. D.W.1 V.De Monte

List of Documents:

1. Ex.P1 13.5.81 Partnership deed
2. Ex.P2 13.5.81 Agreement
3. Ex.P3 25.6.87 Notice
4. Ex.P4 3.7.87 Reply notice
5. Ex.P5 20.8.87 Rejoinder
6. Ex.P6 Receipts
7. Ex.P7 25.8.81 Promissory note
8. Ex.P8 21.12.81 Promissory note
9. Ex.P9 5.1.82 Promissory note
- 10.Ex.D1 Xerox copy of the list of documents containing the signature of the father of the plaintiffs
- 11.Ex.D2 25.6.87 Notice and acknowledgement series
- 12.Ex.D3 Copy of plaint in O.S.No.7022/87
- 13.Ex.D4 Copy of written statement in O.S.7022/87
- 14.Ex.D5 1.2.96 Copy of Judgment in O.S.7022/87
- 15.Ex.D6 1.2.96 Copy of decree in O.S.7022/87
- 16.Ex.D7 11.5.83 Letter

nsv/

M.CHOCKALINGAM, J.

Judgment

in

C.S.No.180 of 1990